

The Mushwana Report and prosecution policy

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ABSTRACT

The meaning of the expression 'a prima facie case' as it is used in South Africa and in several other jurisdictions, and is considered also the nature of the role of the prosecutor in South Africa when considering whether or not a matter should be brought to trial is reviewed. It is argued that this involves considerations which are different from the question which the trial judge must consider at the end of the case for the prosecution in terms of s 174 of the Criminal Procedure Act, and that similar considerations are general to, and inherent in, the accusatorial mode of trial elsewhere. The Report by the Public Protector into the objections brought by a person of whom it was said by the National Director of Public Prosecutions that, despite the existence of a prima facie case of offences committed by that person there would be no prosecution, is reviewed.

Introduction

On 23 August 2003, evidently reacting to intense public interest in South Africa in a matter which entailed a protracted investigation by various State organs including the National Directorate of Public Prosecutions, the National Director of Public Prosecutions issued a press statement to the effect that-

'After careful consideration in which we looked at the evidence and facts dispassionately, we have concluded that, whilst there is a *prima facie* case of corruption against the Deputy President, our prospects of success are not strong enough. That means that we are not sure if we have a winnable case'.

'Accordingly, we have decided not to prosecute the Deputy President.'¹

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¹ This quotation, and factual details relating to the matter, are taken from the *Special Report on an investigation by the Public Protector of a complaint by Deputy President J*

On 30 October 2003, the Deputy President referred this press statement to the Public Protector for his consideration² in terms of the provisions of s 6 of the Public Protector Act 23 of 1994 on the grounds that–

‘... [T]he decision not to prosecute by the National Director (supported by the Minister of Justice), whilst at the same time stating that there was a ‘prima facie’ case against me, has effectively denied me the opportunity to defend myself both as a citizen of this country and as a government official holding a high ranking office.’³

On 28 May 2004 the Public Protector, Adv. ML Mushwana, duly submitted an interim report (referred to hereafter as the Mushwana Report) to Parliament where it was considered. In it, the Public Protector discussed the law relating to, and the meaning of, the expression ‘a prima facie case’ with special reference to its use in a criminal context.

In summary, he remarked that its origin is ‘legalistic’ and that it is used not only by lawyers but also by journalists and others who often ‘quote it out of context and meaning’.⁴ Basing himself on the authoritative textbook by Hoffmann and Zeffertt,⁵ he noted two usages or meanings of the expression. The first–

‘relate[s] to a particular stage in a civil or criminal case before a court of law when the presiding officer has to decide whether or not to decree absolution at the end of the case of the plaintiff or to discharge the accused at the end of the prosecution’s evidence’.

He then quoted from the book:

‘It is often said that in the absence of such evidence there is “no case to answer”, but the refusal of absolution or discharge does not necessarily mean that an answer is required. The defendant or accused may close his case at once and still succeed. In this sense, therefore, a ruling that a party has “made out a *prima facie* case” means only that his opponent runs the risk of losing if he offers no evidence.’

Zuma against the National Director of Public Prosecutions and the National Prosecuting Authority in connection with a criminal investigation conducted against him, 28 May 2004; available at <http://www.pmg.org.za/bills/040529ppprotect.htm> accessed on 2 June, 2005.

² Other issues were also referred to the Public Protector, but they are not material to this article. To avoid any misunderstanding, the point must be made that the factual background to the incident which brought the matter to the attention of the Public Protector and the identity of the various individuals are irrelevant to this article. The Public Protector addressed the legal issues of the complaint before him in general terms, and his conclusions are of general application regardless of the nature of any allegations under consideration, or the identity of any individuals involved. This article is written in the same spirit.

³ Above [n1] para 3 3 2 1.

⁴ Mushwana Report, above (n1) para 21 1.

⁵ LH Hoffmann and DT Zeffertt *The South African Law of Evidence*; now see DT Zeffertt, A Paizes and A St Q Skeen, *The South African Law of Evidence* (2003).

He emphasised that the question of whether a *prima facie* case exists or not is a matter for the court to decide.

The second meaning relates to what might be better called ‘*prima facie* proof’. The Public Protector quoted from Hoffmann and Zefferdt where the authors in turn quoted with approval what Stratford JA said in *Ex parte Minister of Justice: re R v Jacobson and Levy*:

Prima facie evidence in its usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his onus.⁶

Referring to *S v Heller (2)*,⁷ *S v Cooper*⁸ and *R v Blom*,⁹ the Public Protector emphasised that the question of whether or not a *prima facie* case existed is a matter for the court to decide and this could be done only after the prosecution evidence had been heard and had been subjected to cross examination, the accused’s ‘version’ having been put to the prosecution’s witnesses for their comment. The court must then be satisfied that ‘a reasonable person might, in the absence of further contesting evidence by the accused, convict him/her of the crime he/she is being charged with’.

It followed inevitably that the Public Protector would conclude that the Press statement referred to above ‘was unfair and improper’, for it ‘unjustifiably infringed upon Mr Zuma’s constitutional right to human dignity and caused him to be improperly prejudiced.’¹⁰

The Mushwana Report is limited essentially to a brief statement of the South African law, so far as this relates to the functioning of the prosecution, on the issues referred to it. It makes no attempt to consider in any depth the *prima facie* test or rule in any wider context – more specifically, the application of s 174 of the Criminal Procedure Act¹¹ which relates to the discharge of an accused at the end of the prosecution’s case. The Report effectively – and correctly – makes it clear that there must be no blurring of, or link between, the prosecutor’s discretionary decision on whether to prosecute or not, and a judicial officer’s discretionary application of the power created by s 174 of the Criminal Procedure Act to discharge

⁶ 1931 AD 466 at 478.

⁷ 1964 (1) SA 524 (W).

⁸ 1976 (2) SA 875 (T).

⁹ 1939 AD 188.

¹⁰ Mushwana report op cit (n1) paras 22 5 and 22 6.

¹¹ Act 51 of 1977. Section 174 reads as follows:

‘If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.’

at the end of the prosecution's case. The point is an essential feature of the criminal process, and it reflects the impact of the Bill of Rights on the criminal process.

The new human rights culture in South Africa, and in particular the protection of the right to human dignity, has had far-reaching effects on all aspects of the criminal process. Introduced in 1994 by the Interim Constitution¹² and re-asserted more elegantly by s 10 of the Constitution,¹³ it adds to the rights set out in s 35 of the Constitution which deal with arrested, detained, and accused persons. The changes in the substantive law and the procedures by which it is enforced are developing a regime in which criminal investigations and trials will not be arbitrary, brutal and degrading processes. While reform is still work in progress, the criminal justice system process, from start to finish, is at last developing into a more just and reliable machine for enforcing criminal justice than ever before in South Africa's history.

The Bill of Rights, moreover, helps to make it a robust system: it strengthens it by laying down enforceable standards as protections against abuse, and it provides mechanisms to do the enforcing. However, the components of the criminal process must not be taken for granted and must be used only for the purposes for which they are intended and designed, starting with how suspicions or allegations of crime are dealt with. The mechanism as a whole must be treated with respect at all times if legitimacy, acceptance and respect by the community are to be accorded to its products: the preliminary investigations, decisions on whether to prosecute or not, any ensuing trials and verdicts, decisions on ancillary matters, and, in the event of convictions, the sentences. In *Ferreira v Levin NO; Vryenhoek v Powell NO*¹⁴ Sachs J listed several of these components and described them as 'composite and mutually re-enforcing parts of the adversarial system of criminal justice that is deeply implanted in our country and resolutely affirmed by the Constitution.'

The best criminal trial can offer no more than a decision, accepted by the community as legitimate, which reflects the best possible approximation to what actually happened and which forms the substance of the allegations against the accused:

'Participants in trials are encouraged by the formal procedures of the trial to try to reconstruct clear versions of possibly muddled real events. This opportunity to reconstruct symbolically an account of an incident implies that the portrayal of incidents in trials will often be clearer than the incident was in its natural

¹² Constitution of the Republic of South Africa, Act 200 of 1993, s 10.

¹³ Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁴ 1996 (1) SA 984 (CC) at 1107.

state...Indeed, actual incidents that were ambiguous for those involved or that might easily have developed in other directions are vulnerable to considerable reconstruction in the trial setting.¹⁵

The real world lacks the retroscopic powers of time-travel. If it existed, we would not need criminal trials at all. Without embarking on yet another journey into metaphysics and philosophy to define 'truth', let us assume that most – perhaps even the overwhelming majority – of the results of the criminal justice process in a democratic society with an active human rights culture gain their legitimacy because they are popularly considered to be more or less congruent – within an acceptable margin of tolerance – with what one might call the 'truth'.

In a system that strives to protect human rights in a democratic setting, it is possible to address at least to some extent the unease that comes from acknowledging that the very best courts may come to less than perfect conclusions. There is provision for appeals, for example, and the substantive law itself can be measured against the Constitution. One reason that the Constitutional Court in South Africa ruled that the death penalty was inconsistent with our Constitution was, in effect, because we might subsequently find too late that the danger of an error, under which every trial court functions, was not merely potential but actual in the case before it.¹⁶ Putting a person to death as a sentence of the court involves a risk – however remote – of an irreparable mistake which is so ghastly that a society committed to a human rights culture cannot tolerate it. It endangers the legitimacy of the criminal process as a whole.

In such a society, criminal justice is not a game played on a level playing-field – from the very outset, the prosecution plays uphill. The presumption of innocence, which can be rebutted only by proof of guilt beyond reasonable doubt, is merely the scene-setting starting point when a matter comes to trial. Before it even gets that far, it has to pass through the filter of the prosecutor's discretion.

The prosecutor's discretion

The policy directive

Behind the Mushwana Report lies the entire issue of the discretion of the prosecutor. This must be seen in the context of the independence of the institution itself.

¹⁵ W Lance Bennett and Martha Feldman, *Reconstructing Reality in the Courtroom* (1981) 167.

¹⁶ See per Chaskalson J in *S v Makwanyane* 1995 (3) SA 391 (CC) at para 145 – a view with which all the judges concurred.

The National Directorate of Public Prosecutions (NDPP)¹⁷ in South Africa is established by s 179 of the 1996 Constitution,¹⁸ and the National Prosecuting Authority Act¹⁹ was enacted as required by that section to give form and substance to it. Section 179(4) of the Constitution requires the legislation to ensure that the Authority acts 'without fear, favour or prejudice' when it exercises its power to institute criminal proceedings in terms of sub-s (2). The section, however, does not give any guidance on the criteria to be used when exercising that power, but requires the Director to determine the policy to be observed in the prosecution process and to issue Policy Directives accordingly.²⁰

An interesting provision of the Act is that, in terms of s 22(4)(f), the NDPP-

'shall bring the United Nations Guidelines on the Role of Prosecutors²¹ to the attention of the Directors and prosecutors and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation...'

Attention is drawn to Guideline 17:

'In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.'

It is in this context that one turns to the Policy Directive issued by the NDPP.²²

The Directive states that-

'In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.'²³

The Directive provides guidance on how the decision should be approached, pointing out that it may be a difficult one to take. It advises prosecutors to consult with prospective witnesses, and to consider the 'version or the defence of an accused'. It states, 'This test of a reasonable

¹⁷ The abbreviation NDPP is used below to denote either the National Directorate as a whole, or the National Director, or (with conscious ambiguity) both, as the context requires.

¹⁸ Act 108 of 1996.

¹⁹ 32 of 1998.

²⁰ Paras. 5(a) and 5(b).

²¹ Available at http://www.unbchr.ch/btml/menu3/b/b_comp45.htm, accessed on 27 October, 2004.

²² Available at <http://www.npa.gov.za/npa/PolicyManuals/ProsecutionPolicy.doc> accessed on 27 October, 2004.

²³ Under '(a) General', in Part 4, 'Criteria Governing the Decision to Prosecute'.

prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution.²⁴

Other provisions deal with 'public interest' considerations – where the prosecutor might decide that the public interest justifies a decision not to proceed even if the 'reasonable prospect' test is met.²⁵ As the National Director made no reference to this aspect in his comments and it was neither referred to nor considered by the Public Protector, it is not considered in this paper. In any event, the question of whether the public interest requires a prosecution can arise only after the 'evidential limb' of the process has been satisfied.²⁶

It should be noted that the references in the passages in the Directive quoted above are to 'an accused'. The wording is unfortunate, as no decision will have yet been taken that the person should be prosecuted. The point is not trivial, for the rights guaranteed under s 35(3) of the Constitution accrue to a person who is an accused, and while some of these may be appropriate in relation to a suspect this is not a status which is dealt with expressly by the Constitution.²⁷ In fact, the words 'suspect' and 'accused' are used inconsistently throughout the Directive – sometimes correctly, and sometimes incorrectly. For example, in the first paragraph of Part 4(a) the Directive notes that the process of deciding whether or not to prosecute often starts when 'the suspect' has been arrested, and the first paragraph of Part 5(b) – which deals with restarting a prosecution – addresses the situation which arises when 'a suspect or an accused is informed that there will not be a prosecution or that charges have been withdrawn'. These appear to be the correct use of the two terms, recognising the distinction between them. On the other hand, in

²⁴ Cf Dirk van Zyl Smit and Esther Steyn, 'Prosecuting Authority in the New South Africa,' in *CJL Yearbook*, Justice Robert D Nicholson (Geneva: Centre for the independence of judges and lawyers, 2000), 150: the Directive 'exhorts' prosecutors to do 'what all good prosecutors should do, namely not to proceed unless they have a reasonable prospect of securing a conviction'.

²⁵ The NDPP's policy directive acknowledges that –

'There is no rule in law which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.'

Briefly, the policy document then requires prosecutors to consider whether a prosecution is in the public interest, taking into account (amongst other matters) the nature and seriousness of the offence, the interests of the victim and the broader community, and the circumstances of the offender. Similar guidelines exist in other jurisdictions.

²⁶ Graham Mansfield and Jill Peay *The Director of Public Prosecutions: Principles and Practices for the Crown Prosecutor* (1987) 11.

²⁷ Nico Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of South Africa* (1998) 275.

Part 3 ('The Role of the Prosecutor') it is stated that the prosecutor has to take 'the decision whether or not to institute criminal proceedings against *an accused*'.²⁸ However, unless a person has been arrested and formally indicted, served with a summons or handed a written notice then criminal proceedings have not yet been instituted and that person cannot be said to be 'an accused'.²⁹

It appears that the three statuses of being an accused, someone who has been arrested (or detained), and a suspect overlap or interlock in various ways. The question arises: is there yet another type of status which one may occupy, in which one is a person about whom the NDPP may properly publish a statement to the effect of the one which was referred to the Public Protector? Such a person is most definitely not an accused, for the whole purpose of the statement is to announce that there will be no prosecution. As far as such a person being a suspect is concerned, in *S v Sebejan*,³⁰ Satchwell J said that -

'The crux of the distinction between the arrested person and the suspect is that the latter does not know without equivocation or ambiguity or at all that she is at risk of being charged. The suspect may herself have an inkling that she is mistrusted by the investigating officer; she may even have been told that she is at some risk of being arrested; but the suspect has not been placed on terms.'³¹

The point is not trivial. If cases, legislation, regulations and various other sources - such as the NDPP's Policy Directive - use the terms 'accused' and 'suspect' interchangeably or as if synonyms, then the protection of the constitutional rights of the individuals involved is seriously and prejudicially compromised due to the confusion and difficulty in determining the extent of the constitutional protection afforded by s 35(3). Especially when a person is most vulnerable on the street or in the police station and before legal advice can be furnished, improper decisions based on a mistaken view of that person's status may lead to irreparable damage to that which the Constitution seeks to safeguard. A deliberate ambiguity would make a nonsense of lawyers' eternal quest for clarity, and the legal status of the individual involved requires clarity from the outset if the section is to be effective. This is clearly implicit in what Satchwell J said in *Sebejan*.

She noted also that 'The Constitution is silent with regard to the rights of a suspect who is neither arrested nor detained'.³² The statement by the NDPP makes it clear that the person concerned, who was not detained, was not at risk of being charged or arrested, and it would appear that he was not a suspect either as described by Satchwell J. On the other

²⁸ Emphasis added.

²⁹ Steytler, op cit (n27) 275.

³⁰ 1997 (1) SACR 626 (W).

³¹ Op cit 632.

³² Supra (n30) at 635.

hand, the NDPP claimed that there was a '*prima facie* case' against him; accordingly, it seems that if one were to argue that the Public Protector concluded wrongly that this was an improper thing to say, then this would create a new, hitherto-unknown status which a person might have - ie, of being someone who is not a suspect as defined by Satchwell J, nor an accused, nor detained, but who might nonetheless properly be described by the NDPP - and, be it noted, not by a court - as '*prima facie*' guilty of a crime on the basis of evidence which has been subjected to the NDPP's 'careful consideration'.

Confidentiality

The Policy Directive describes itself as binding on the Prosecuting Authority, but it is not entirely clear how this is quality is enforced: presumably the procedures of administrative law would be involved. As far as any policies relating to confidentiality are concerned, however, the Act is obviously applicable. The Directive warns that -

'Prosecutors are not allowed to participate in public discussion of cases still before the court because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.'

The Code of Conduct for Members of the National Prosecuting Authority published by the NPA³³ enjoins its members to 'preserve professional confidentiality'; they should -

'refrain from making inappropriate media statements and other public communications or comments, about cases which are still pending or cases in which the time for appeal has not expired.'

Section 41(6) of the National Prosecuting Authority Act states that

'Notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person -

- (a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;
- (b) the contents of any book or document or any other item in the possession of the prosecuting authority; or
- (c) the record of any evidence given at an investigation as contemplated in section 28 (1),
except -
 - (i) for the purpose of performing his or her functions in terms of this Act or any other law; or
 - (ii) when required to do so by order of a court of law...'.³⁴

³³ Available at <http://www.npa.gov.za/npa/PolicyManuals/CodeofConduct.doc> accessed on 31 May, 2005.

³⁴ Section 41(6).

It seems reasonable that a situation may arise in which the National Director may properly wish to let it be known publicly that in a particular matter there would be no prosecution of a named person; to determine, however, whether a statement to that effect is protected by s 41(6)(c)(i) its full contents must be considered. The complaint to the Public Protector³⁵ required a consideration of the criteria which prosecutors must apply when discharging their duty to decide whether or not to prosecute; the Public Protector having ruled that the NDPP had erred as a matter of law in regard to these criteria, it seems to follow that the NDPP could not have been covered by s 41(6)(c)(i) for he referred to confidential matters which thus lay outside his role. On the other hand, while the fact that this may have caused the harm described by the Public Protector demonstrates why the requirement of confidentiality is needed and exists, it is insufficient by itself to render the statement improper.

The issue of confidentiality can be linked to the determination by the prosecutor of whether there is 'sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution'. It seems reasonable that if prosecutors properly apply their minds to the matter, their thought processes might well involve the exercise of asking themselves whether a court might conclude that the admissible evidence amounts to a *prima facie* case for the accused to meet. It seems to be clearly implicit, however, in the Public Protector's analysis that where there is a decision not to prosecute then the limit of what can be properly disclosed as the reason for that decision is the result of the test on which the prosecutor's conclusion must be based – ie, that there is insufficient and admissible evidence to provide a reasonable prospect of a successful prosecution.

The prosecutor's discretion

As will be shown below, in other jurisdictions the discretion of an independent prosecutor is described in terms similar to those used in the Policy Directive in South Africa. They all require prosecutors to decide, as a discretionary matter, whether there is a 'realistic prospect of conviction' or 'sufficient evidence to obtain a conviction', taking into account such objective and subjective factors as the admissibility of evidence and the quality and reliability of witnesses – whether they will 'come up to proof'.³⁶ Mansfield and Peay write,

"Reasonable prospects" is both a subjective test which the prosecutor attempts to apply in an objective manner and an objective test applied, inevitably, on a subjective basis.³⁷

³⁵ See text relating to n3 above.

³⁶ Mansfield and Peay op cit (n26).

³⁷ Ibid.

It is only when a decision has been taken that there is sufficient admissible, substantial and reliable evidence that an identifiable person has committed an offence³⁸ that the question of the public interest arises. As indicated earlier the 'public interest' factor is not dealt with here.

That the various prosecution authorities have similar policies is not an accident. The requirement that such a decision must be taken, and that it must be taken by the prosecutor and nobody else, is a consequence of the internal logic of the accusatorial model of criminal justice where the officers of the trial court (judge, prosecutor, and defence lawyers) are clearly distinguishable and independent, and where legal doctrines such as the presumption of innocence and the requirement that guilt must be proved beyond all reasonable doubt are part of the operational framework.

Mansfield and Peay analyse the concept of a 'reasonable prospect' of a conviction ('whether a conviction is more likely than an acquittal') as a logical matter in the context of the test for a conviction – proof beyond a reasonable doubt. They note three possible interpretations:

- '(i) the prosecutor only has to establish that he has a reasonable prospect (a better than evens chance) of demonstrating that this case will be *one of those* (out of all those cases where he considers) where proof beyond reasonable doubt may be established;
- (ii) the prosecutor only has to prove his case beyond reasonable doubt and does not have to predict the erosive effects of the defence case or take them into account;
- (iii) proof beyond all reasonable doubt is a convenient legal fiction that defies either legal or mathematical quantification.'³⁹

It is not necessary for the purposes of this article to explore their analysis further and to prefer one or other of these meanings as best expressing the function of the prosecutor. Suffice it to note that Mansfield and Peay bring out the clear distinction between the function of the prosecutor who is deciding whether to proceed with a matter by laying a charge

³⁸ Cf David Gandy 'The Crown Prosecution Service: Its Organisation and Philosophy,' in *The Role of the Prosecutor: Report of the International Criminal Justice Seminar Held at the London School of Economics and Political Science in January 1987* ed JE Hall Williams (1988) 12.

³⁹ Op cit (n26) 190 (emphases in the original). It should be noted that the research by these authors was completed and written up before the Code for Crown Prosecutors was published, and that they were therefore unable to include a reference to it. They comment ruefully (viii):

'Such an inclusion, at the time of writing, would have required the skills not of researchers, but of clairvoyants.'

Provided that one bears this in mind when referring to their work, their research remains invaluable and relevant.

against a person – and, be it noted, changing the status of that person from a suspect to an accused – and bringing it to trial, on one hand; and, on the other hand, the function of the court in deciding whether the total body of evidence amounts to proof beyond all reasonable doubt. However one analyses the matter, the tests are manifestly not merely inherently different, but must be applied by different actors for different purposes. It does not seem to be relevant to this discussion that Mansfield and Peay were writing in the context of courts which include lay juries; what they consider must surely apply also to the relative tasks of the South African prosecutor and court for, when considering whether to prosecute or not, the South African prosecutor does not have to take into account how the trial court is constituted. It is, most specifically, not the function of the prosecutor to take and to express a formal decision on guilt or innocence, for the decision that there is a reasonable prospect of a successful prosecution of someone suspected of an offence is a different one from the decision that the person is guilty of that offence. The prosecutor must not usurp the role of the judge.

It is trite that a conviction must be based on all the evidence, including that adduced by the defence, and it is exclusively for the trial court to decide whether what suffices to establish a *prima facie* case is also adequate to convict if that is all the evidence before it.⁴⁰ It should be borne in mind that the contents of the dossier before the prosecutor may be materially different from the evidence before the court at the end of the prosecution case after it has been tested and challenged in cross-examination. It is natural and correct that the tests should be described differently, for they are applied in different contexts for different purposes on different resources.

The words are considered more fully below, as well as aspects of s 174 of the Criminal Procedure Act.

What is a ‘prima facie’ case?

The phrase ‘prima facie’ is used in several ways.

As a Latin adjectival phrase used by Gaius, it has been translated as ‘at first sight’ and ‘on the first impression’. The Oxford English Dictionary defines – or perhaps translates – it as ‘Arising at first sight; based or founded on the first impression;’ it notes its legal association, defining a ‘prima facie case’ as ‘a case resting on *prima facie* evidence’. In South African law, it has been considered in a number of cases, some of which are referred to below.

⁴⁰ See the very precise and lucid analysis in DT Zefferdt, AP Paizes, and A St Q Skeen *The South African Law of Evidence* (Cape Town: LexisNexis Butterworths, 2003) 121ff.

As the Mushwana Report indicated, the question of whether a *prima facie* case has been established against an accused is a matter for the trial court. Once again, this is a necessary consequence of the internal logic of a trial based on the accusatorial model of criminal justice, and in South Africa is given statutory effect by s 174 of the Criminal Procedure Act:⁴¹

‘If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.’

This does no more than state the common-law requirement that there must be a *prima facie* case at the end of the prosecution’s case if accuseds are to be put on their defence.⁴²

In *S v Zimmerie*,⁴³ Friedman J described the section as conferring a discretion on a court which must be exercised ‘in a judicial manner’.⁴⁴ He went on to say that it would be in order to refuse an application for the discharge of the accused if there was reason to expect that the State case would be strengthened by defence evidence. Friedman J was following *S v Shuping*⁴⁵ where Hiemstra CJ first articulated the principle. However, the criticism⁴⁶ which followed Hiemstra CJ’s judgment was given legal force in *S v Lubaxa*⁴⁷ where, with the unanimous concurrence of a full bench of five judges,⁴⁸ Nugent AJA said that if, at the end of the prosecution case the only possibility of a conviction depended on self-incriminating evidence, the accused is entitled to be discharged:

‘The failure to discharge an accused in those circumstances, if necessary *mero motu*, is, in my view, a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

‘The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify,

⁴¹ Act 51 of 1977.

⁴² Cf in England and Wales, the Crime and Disorder Act 1998, Schedule 3 cl 2(2), which provides that the judge may dismiss a charge ‘if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him’.

⁴³ 1989 (3) SA 484 (C).

⁴⁴ *Supra* (n43) 486.

⁴⁵ 1983 (2) SA 119 (B).

⁴⁶ A St Q Skeen, ‘The decision to discharge an accused at the conclusion of the State case: A critical analysis’, (1985) 102 *SALJ* 286; H Rudolph, ‘The 1993 Constitution – Some thoughts on its effect on certain aspects of our system of criminal procedure’, (1994) 111 *SALJ* 497, 510. See also *S v Phuravbatha*, 1992 (2) SACR 544 (V), *S v Mathebula* 1997 (1) SACR 10 (W), *S v Tsotetsi* (2) 2003 (2) SACR 638 (W).

⁴⁷ 2001 (4) SA 1251 (SCA) at 1256-7.

⁴⁸ Harms JA, Scott JA, Mpati JA, Conradie AJA and Nugent AJA.

but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated’

It is submitted that the doubts cast on *Zimmerie* and *Shuping* are justified and that it is unlikely that this line would be followed now.

This important passage puts the stamp of judicial approval to the test of ‘reasonable and probable cause’ as being the basis of a decision to prosecute, notwithstanding that the NDPP policy document uses the phrase ‘reasonable prospect of success’. There can be little difference in meaning between the phrases: both relate to the same decision to be taken at the same point in the criminal process.

Lubaxa’s case should be read with *S v Legote*,⁴⁹ where judgment was given in the same court just five months previously. Harms JA gave the unanimous judgment of the bench of three.⁵⁰ He reviewed briefly the background and history to the principle relating to the discharge of the accused at the end of the prosecution case, referring to *Magmoed v Janse van Rensburg*,⁵¹ and said that –

‘As die verhoor besig is om te ontaard of tot niks te lei nie, is die hof geregtig om ‘n aanduiding daarvan te gee. Die bevoegdheid om ‘n saak aan die jurie te onttrek omdat daar nie voldoende getuienis teen die beskuldigde is nie, is heelwat ouer as art 221(3) van die Wet op de Kriminele Procedure en Bewijslevering 31 van 1917.’⁵²

In *Lubaxa*, the full bench of the Supreme Court of Appeal confirmed the view taken in *Legote*’s case that this would apply equally to represented and unrepresented accuseds. Under the circumstances, it is reasonable to conclude that none of the judges in *Lubaxa* saw any conflict between the two decisions,⁵³ which should be interpreted as between them explaining the application of s 174 of the Criminal Procedure Act. Nugent AJA seems to have been aware of the distinction between what is necessary to invoke s 174 (a judicial decision) and what is required for a case even to come to trial at all (the prosecutor’s discretionary decision).

⁴⁹ 2001 (2) SACR 179 (SCA). Though showing that s 174 is subject to the Bill of Rights and the application of *Zimmerie* is now limited, they are not mentioned in this context by PM Bekker, T Geldenhuys, JJ Joubert et al *Criminal Handbook* 6 ed (2003).

⁵¹ 1993 (1) SA 777(A).

⁵² If the trial is beginning to degenerate (‘ontaard’) or to come to nothing, the court has the power to give an indication of this. The obligation to withdraw a case from the jury because there is insufficient relevant evidence against the accused is considerably older than s 221(3) of the Criminal Procedure and Evidence Act 31 of 1917: supra (n49) 184.

⁵³ The more so, as Harms JA gave the unanimous judgment in *Legote*.

The effect of establishing a *prima facie* case is explained by Nugent AJA:

'If, in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward – the accused may not be discharged and the trial must continue to its end.'⁵⁴

It is convenient to describe this situation as one in which the prosecution has made out a *prima facie* case though it is, in fact, not easy to find a definitive reference to the phrase '*prima facie*' as used thus in South African criminal jurisprudence even though its use abounds. In *S v Van den Berg*⁵⁵ it was used casually and in passing in this way by the Namibia, High Court, and this seems to characterise the usage – a general assumption that everyone knows what it means in practice. Occasionally, a fuller comment is made: a typical example is in *S v Nzimande*⁵⁶ where the court referred to the presence of incriminating fingerprints as constituting a *prima facie* case which required a response from the accused:

'Dit is by uitstek getuienis wat *prima facie* bewys daarstel en wat 'n antwoord of verduideliking verg; dit word dan afdoende bewys as geen antwoord in die vorm van weerleggende getuienis aangebied word nie.'⁵⁷

However, the matter is not so simple. More recently, in *S v Ntshwence*⁵⁸ the court referred to certain matters as merely constituting -

'.....prima facie proof of the commission of the offence of contempt of court which may be upset by an accused's explanation that her or his conduct was not deliberately intended to bring the court into disrepute'.

In *Ex parte the Minister of Justice: in re R v Jacobson & Levy*⁵⁹, after the sentence used in the Mushwana Report,⁶⁰ the court continued:

'In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus. It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue; it depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue. If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence "calls for an answer" then, in such case, he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus

⁵⁴ *Lubaxa*, supra (n47) para. 11.

⁵⁵ 1996 (1) SACR 19 (Nm) at 63.

⁵⁶ 2003 (1) SACR 280 (O).

⁵⁷ 'It is pre-eminently evidence constituting *prima facie* proof and demands an answer or explanation: it becomes proof if no answer in the form of exculpatory evidence is offered.'

⁵⁸ 2004 (1) SACR 506 (TkD) at para 29.

⁵⁹ 1931 AD 466 at 478-9.

⁶⁰ 281 supra.

of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, again amounts to full proof. These principles are to be extracted both from decisions in the Courts of South Africa and in England.'

This is, unfortunately, not as good a definition as one might need of a 'prima facie' case, for there was no consideration of the predecessor of s 174 of the Criminal Procedure Act,⁶¹ and the effects of the Constitution now need to be taken into account. In *Jacobson and Levy* itself, moreover, the matter was seen somewhat differently by Wessels ACJ. Putting aside his discussion of the situation where the onus of proof in the case of a criminal trial has been placed by the legislature on the accused, he emphasised that the burden of proof is always on the prosecution – an onus, he said, that never shifts. His further discussion suggests clearly that he was uncomfortable with the idea that a *prima facie* case would automatically and as a matter of course become conclusive proof in the absence of evidence from the accused.

The statement that in the absence of an answer from the other side *prima facie* proof becomes conclusive proof is, with respect, an erroneous and indeed a dangerous over-simplification if this is understood to mean that the transformation is automatic. Even before *Lubaxa*, it was said in *R v Jansen*⁶² that this must be wrong and, in *R v Broschke*, van den Heever AJA quoted with approval⁶³ a passage from the English case of *R v Stoddart*⁶⁴ which the Lord Chancellor had himself earlier approved of in *Woolmington v DPP*.⁶⁵

'....."prima facie" cases of guilt in the trials of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged'.

Van den Heever AJA continued:

'Nothing could have been stated in a plainer way. It does not mean that, if the accused fails to rebut the *prima facie* case, then the evidence becomes conclusive of his guilt. The Court must still consider whether, on the whole of the evidence, the Crown has proved the guilt of the accused beyond all reasonable doubt. It then becomes a question of what weight should be attached to the evidence produced, having regard to the rule of the onus being always on the Crown.'

Nugent AJA, in *Lubaxa*, was apparently aware of the point for he referred

⁶¹ In former years, the law had to deal with jury trials also: see s 221(2) of the Criminal Procedure and Evidence Act, 31 of 1917, which enabled the court to direct the jury to return a verdict of not guilty.

⁶² 1937 CPD 301.

⁶³ 1946 OPD 303 at 312-3.

⁶⁴ 2 Cr App R 233.

⁶⁵ *DPP v Woolmington* [1935] All ER 1 (HL), [1935] AC 462.

to a possibility and not a certainty of a conviction, saying that a *prima facie* case meant no more than that an accused might be convicted.

The situation today seems to be that the court may refuse to discharge the accused under s 174 – which empowers the court to return a verdict of not guilty in the absence of a *prima facie* case – but it does not follow from the manner in which the section has been interpreted that if it does not use this power then the accused is guilty without more ado in the absence of defence evidence. Should there be no defence evidence, the body of evidence which the court has just found constituted a *prima facie* case must then be tested to the standard of proof beyond all reasonable doubt. The decision that the prosecution has made out a *prima facie* case means no more than that, in the absence of defence evidence, the accused runs the risk of being convicted⁶⁶ – and however grave a risk it may be, it is no more than a risk:

‘It may depend upon “the relative ability of the parties to contribute evidence on that issue”.⁶⁷ If it lies exclusively within the power of a party to show what the true facts were, his or her failure to do so may entitle the court to infer that the truth would not have supported his or her case; but if there is no reason to expect a party to be able to throw light on the facts, his or her silence can add nothing to the evidence adduced by his or her opponent.’⁶⁸

A little care needs to be exercised with this passage. In the absence of any defence evidence, the test in a criminal trial for deciding whether the total body of evidence before the court at the end of the prosecution case establishes a *prima facie* case remains very different from the test of whether that same body of evidence establishes guilt – ie, proof beyond all reasonable doubt. The caveat by Zeffertt in the above quotation is no more than an example of what might occur; it is neither necessary nor even possible to draw up an exhaustive list of situations where the prosecution case amounts to the total of evidence before the court and has been held to support a *prima facie* case, but may nevertheless fail to constitute conclusive proof of guilt beyond all reasonable doubt. This is no more than a particular application of the general rule that the verdict is invariably a matter to be resolved by the court by a consideration of the whole body of testimony before it.

The fact that the accused may have tendered no evidence cannot create an exception to this and cannot lead as a matter of law to the conclusion that the prosecution has done all it needs to do to discharge its full criminal

⁶⁶ DT Zeffertt, AP Paizes, and A St Q Skeen, *The South African Law of Evidence* (2003) 124.

⁶⁷ *Jacobson and Levy's case* supra (n59) 9.

⁶⁸ *Supra* (n66) 125.

onus of proof.⁶⁹ Even though *Jacobson and Levy's* case was decided long before the new Constitution⁷⁰ and has been relied on since then, the impact of s 35(3)(b) of the Bill of Rights⁷¹ cannot be escaped. Indeed, long before the Bill of Rights, *Jacobson and Levy's* case was being treated with caution: in *R v Mantell*, for example, Bloch J said:

'What is decisive is not the fact that there was no, or no acceptable, answer: it is the fact that what called for an answer was in the *circumstances* so cogent that, if unanswered, it would amount to "sufficient proof"'⁷²

This could be taken to mean that there must be evidence sufficient to put a matter in issue, and if at the end of the day there is a doubt then it must be resolved in favour of the accused.⁷³ In *New Zealand Construction (Pty) Ltd v Carpet Craft*⁷⁴ it was said by Leon J that if full effect were given to the approach in *Jacobson and Levy's* case -

'....it would follow that every *prima facie* case, however weak, would become conclusive in the absence of evidence from the other side. With due deference to those cases I would respectfully doubt whether such a conclusion would always be justified. If it were proper to have regard to this piecemeal form of reasoning I would prefer to say that the *prima facie* case may become conclusive.'

Though the point is of little more than academic interest now, it seems that the law was probably as described above even before the Bill of Rights.

Canadian law

These matters have been considered in the context of the Canadian Charter of Rights and Freedoms, and its similarity with the South African Bill of Rights makes the Canadian experience useful. In *Dubois v R*,⁷⁵ Lamer J said that the Canadian Constitution -

'imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or by calling other evidence.'⁷⁶

⁶⁹ See *New Zealand Construction (Pty) Ltd V Carpet Craft* 1976 (1) SA 345 (N), where similar unease was expressed about the meaning of *Jacobson and Levy's* case in the context of a civil trial. In this case, Leon J relied on *R v Mantell* 1959 (1) SA 771 (C) in support.

⁷⁰ Act 108 of 1996.

⁷¹ Every accused person has a right to a fair trial, which includes the 'right.....to be presumed innocent, to remain silent, and not to testify during the proceedings....'

⁷² 1959 (1) SA 771 (C), 776 (emphasis added); Bloch J said that he preferred this phrase to 'full' or 'complete' or 'conclusive' proof, as used as used in *Jacobson and Levy's* case *supra* (n59) at 478-9.

⁷³ Cf *S v Trickett* 1973 (3) SA 526 (T), per Marais J at 537.

⁷⁴ 1976 (1) SA 345 (N) at 348.

⁷⁵ 23 DLR (4th) 503.

⁷⁶ *Supra* (n75) at para 41.

Referring with approval to various commentators on the Canadian law, he said that the idea of a 'case to meet' is what protects the non-compellability rule.⁷⁷ The effect is that the Crown must prove its case before there can be any expectation of a response from the accused, but the burden of proving guilt beyond all reasonable doubt remains on the prosecution to the end.⁷⁸ Quoting from one authority, he said:

'The accused need only respond once. The Crown must present its evidence at an open trial. The accused is entitled to test and to attack it. If it does not reach a certain standard, the accused is entitled to an acquittal. If it does reach that standard, then and only then is the accused required to respond or to stand convicted.'⁷⁹

The standard referred to is, in short, what can be called a *prima facie* case.

English law

Similar provisions are to be found in England and Wales. In a Crown Court trial on indictment, the judge may dismiss a charge 'if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him'.⁸⁰ The current editors of Archbold state that a submission that there is no case to answer should be allowed where there is no evidence 'upon which, if the evidence adduced were accepted, a reasonable jury, properly directed, could convict'.⁸¹ In the case of a summary trial, they observe that the magistrates are the judges of both facts and law and accordingly they submit that at the close of the prosecution case or later, if there is some evidence which, if accepted, would entitle a reasonable tribunal to convict, they nevertheless have the same right as a jury to acquit if they do not accept this evidence, whether because it is conflicting, or has been contradicted, or for any other reason.⁸²

Prosecution policy in other jurisdictions

The policy of the NDPP that there must be a 'reasonable prospect of a conviction' for a prosecution to be commenced or continued is similar to the stipulated requirements in the United Kingdom and elsewhere. The similarity with the United Kingdom is unsurprising, given the strong

⁷⁷ In South Africa, this would be ss 35(1) and 35(3)(b) and (j) of the Bill of Rights.

⁷⁸ 'The Role of the Accused in the Criminal Process' in Tarnopolsky and Beaudoin eds *The Canadian Charter of Rights and Freedoms, Commentary* (1982) at 335, 358-9.

⁷⁹ E Ratushny, *Self-incrimination in the Canadian Criminal Process* (1979) 180.

⁸⁰ Crime and Disorder Act 1998, Schedule 3 cl 2(2).

⁸¹ John Frederick Archbold, *Criminal Pleading, Evidence and Practice* gen ed PJ Richardson (2004) at para 4-292.

⁸² Archbold, op cit (n81) at para 4-296.

historical influence, but this becomes less significant when one finds parallels elsewhere. In fact, the wide similarity reflects a necessary feature and consequence of an accusatorial system⁸³ of criminal justice. What follows is but the barest survey of several countries in order to show that basically similar procedures are found where the accusatorial model of criminal process is followed. South Africa, in other words, is not unique.

England and Wales

The Crown Prosecution Service publishes an document analogous to the one by the NDPP in South Africa. The *Code for Crown Prosecutors*⁸⁴ states that

‘5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a “realistic prospect of conviction” against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case.

5.2 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A jury or magistrates’ court should only convict if satisfied so that it is sure of a defendant’s guilt.

5.3 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears....’

The code continues by offering guidance to prosecutors when addressing these matters.

Scotland

As Scotland constitutes a separate jurisdiction within the United Kingdom for many purposes, the Crown Office and Procurator Fiscal Service have

⁸³ Contrast the criminal process in this regard with the inquisitorial model in eg Germany: Hans-Heinrich Jescheck ‘The Discretionary Powers of the Prosecuting Attorney in West Germany’ (1970) 18 *AmJCompL* 508, 509. The author draws attention to the ‘legality principle’ which has the effect of preventing the use of discretion on the part of the state’s attorney in the institution or pursuit of investigation into criminal activity, and further –

‘...forbids any exercise of discretion in the decision whether, on the basis of his investigation, he has evidence sufficient to press charges’.

Jescheck’s article is one of several in a symposium which also covers France, Canada, Japan, and the United States of America.

⁸⁴ Available at <http://www.cps.gov.uk/publications/docs/codeeng.pdf>, accessed on 4 November, 2004.

published separately the policy⁸⁵ relating to their prosecution processes, as well as a code.

The policy statement gives an account of the structures involved, the Procurator Fiscal being responsible at local level for the investigation and prosecution of crime in the public interest. It is interesting that – similar in certain respects to South Africa – the prosecutor in Scotland has a statutory power to direct the police in the investigation of crime:

‘The decision whether criminal proceedings should be commenced rests with the Procurator Fiscal, whether or not any person has been arrested or “charged” by the police. The Procurator Fiscal’s discretion to prosecute or not is a principal feature of the system. There is no rule of law in Scotland that a criminal offence must be prosecuted. No one can oblige the Lord Advocate to prosecute, and no one except the Lord Advocate can oblige the Procurator Fiscal to prosecute.

...

‘Before taking any action on a matter reported to him, the Procurator Fiscal must be satisfied that the circumstances disclose a crime known to the law of Scotland. He must then consider whether there is sufficient admissible and reliable evidence to obtain a conviction. If the evidence appears to be insufficient the Procurator Fiscal can instruct the police to carry out further enquiries. If the Procurator Fiscal is satisfied after full inquiry that the evidence is insufficient he will take no proceedings.’

A fuller account of the actual practice governing prosecutions is published in the code.⁸⁶ This says that for a prosecution to commence the Procurator Fiscal must be satisfied that there is ‘sufficient admissible evidence to justify commencing proceedings’.⁸⁷ Generally this requires corroboration, and the code deals with questions of admissibility, reliability and credibility.

Both the policy statement and the code address the issue of confidentiality, and the relevant passages are worth quoting in full. According to the policy statement:

‘When Crown Counsel or the Procurator Fiscal decide not to prosecute there will be good reasons for that decision, which will be based on careful, professional consideration of the case and the relevant law. There are sound reasons for the established practice of not explaining those reasons to a third party. For example, the prosecutor will often have based his decision on reports and statements that are confidential. It would be a betrayal of the witnesses’ trust if their evidence were made public other than in court. Moreover, if the prosecutor disclosed that he believed the victim, and would have prosecuted if

⁸⁵ Available at http://www.crownoffice.gov.uk/departamental/sole_public_pros.btm, accessed on 4 November, 2004.

⁸⁶ Crown Office and Procurator Fiscal Service, *Prosecution Code*; available at http://www.crownoffice.gov.uk/publications/CO_Pcode.pdf accessed on 5 November, 2004.

⁸⁷ Op cit (n86) 4.

there had been any supporting evidence, this would amount to condemning the accused publicly without a trial. Equally, if the prosecutor referred publicly to his assessment of the victim's account, this could prove extremely damaging to the victim. The only proper place for the Crown to comment publicly on these and similar matters is in court.'

The code adds a little to this:

'The prosecutor cannot disclose publicly the detailed reasons for a decision in a particular case. There are a number of reasons for this policy; the decision will have been based on confidential information, for example information relating to matters such as the credibility, reliability or state of health of an essential witness or details of police operations.

'Furthermore, public disclosure of the reasons for not proceeding or for accepting reduced pleas may expose the accused person to accusations of crime in circumstances where he no longer has the opportunity of defending himself against such allegations in a court of law.'⁸⁸

United States

It is impossible in the present context to provide a full review of the relevant components in the criminal justice process in the United States. However, to the extent that this article is concerned with one aspect of the discretion to prosecute as exercised by persons who have the duty to initiate criminal proceedings, note should be taken of the standards set out by the American Bar Association in its review of the prosecution function.⁸⁹

'A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.'⁹⁰

According to Salzberg and Capra, writing generally about prosecution decisions, the prosecution must believe that the evidence is sufficient to secure a conviction, and that it is in the community's best interest to prosecute the suspect.⁹¹

While criminal justice in the United States is accusatorial, it is impossible and potentially confusing to attempt any general, direct and detailed comparisons between the United States and other jurisdictions with

⁸⁸ Op cit (n86) 12.

⁸⁹ Available at http://www.abanet.org/crimjust/standards/pfunc_blk.html#1.2 accessed on 8 November, 2004.

⁹⁰ Supra (n89) Standard 3-3.9 'Discretion in the Charging Decision'.

⁹¹ Stephen A Salzberg and Daniel J Capra, *American Criminal Procedure: Cases and Commentary* (1992), 158. The authors also state that the prosecution must believe that the suspect is guilty.

accusatorial models of criminal trials. This is because of the practice in some states of electing prosecutors by popular vote, the role of the Grand Jury, and the scope and nature of the discretion exercised by the prosecution. A further complication is that there are several different procedures in various state and federal jurisdictions. However, all jurisdictions operate procedures to screen cases before they come to trial in order to make an independent determination whether sufficient evidence exists for a reasonable person to believe that a crime has been committed, and that the accused has committed it.⁹² The phrases 'a *prima facie* case' and 'probable cause', for the purposes of this article, have much the same meaning in the United States; in the broadest sense, they are used to explain criteria to decide whether there is sufficient admissible evidence in a matter to proceed to seizing a jury with the final decision on a verdict.⁹³

Canada

The *Deskbook* published by the Canadian Federal Prosecution Service⁹⁴ sets out the relevant policies. In summary, the first question to be decided is whether the evidence is sufficient to justify the institution or continuation of proceedings; the second is whether the public interest requires that a prosecution should be pursued.⁹⁵ As already indicated, the issues raised by the second question are not developed in this article.

So far as the sufficiency of evidence is concerned, the *Deskbook* states:

'In the assessment of the evidence, a bare *prima facie* case is not enough; the evidence must demonstrate that there is a *reasonable prospect of conviction*. This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law.

'A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown counsel should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction; for example, the existence of a Charter violation that will undoubtedly lead to the exclusion of evidence essential to sustain a conviction. Crown counsel are expected to apply this evidential

⁹² See Joan E Jacoby *The American Prosecutor: A Search for Identity* (1980) 145.

⁹³ For a meticulous examination of the jurisprudence, see Barbara J Shapiro 'Beyond Reasonable Doubt' and 'Probable cause': *Historical Perspectives on the Anglo-American Law of Evidence* (1991) esp 100ff.

⁹⁴ Available at <http://canada.justice.gc.ca/en/dept/pub/jfpsdeskbook.pdf>, accessed on 12 November, 2004.

⁹⁵ Op cit (n94) Part V, 'Proceedings at trial and on appeal' para 15.2.

standard throughout the proceedings – from the time the investigative report is first received until the time of trial...⁹⁶

The reference to ‘a bare *prima facie* case’ should be compared with what the NDPP in South Africa is reported as having said – ie, ‘that, whilst there is a *prima facie* case... our prospects of success are not strong enough’ and that accordingly there would be no prosecution. Whatever the phrase used in the *Deskbook* might mean, it denotes something which the Canadian prosecutor is instructed to regard as being an inadequate basis on which to proceed.

Conclusion

Every profession, trade and discipline has its technical vocabulary which its practitioners use to communicate clearly, unambiguously and accurately and indeed safely. For example, the differences between a ‘virus’ and a ‘bacterium’ are fundamental; the words and the concepts they express are neither ambiguous nor interchangeable, and their misuse may be lethal. Accordingly, a failure by someone trained in the medical sciences and related disciplines to respect their distinct meanings displays not merely ignorance but the gravest incompetence. When lay persons – and especially journalists – use a technical vocabulary to communicate to others it behoves them to do elementary research and to be sure that the words are used correctly, and the example given above is a typical case where misuse seems to be a common phenomenon. News readers or editors who protest at what appears to be pedantry must then make out a case in defence of ignorance.

It goes without saying that when practitioners use the vocabulary of their own art and discipline to communicate with a lay audience, they must choose their words with care to avoid confusion and ambiguity. They may have to qualify their words, or generalise carefully or explain as they proceed, but they must never misuse their vocabulary or mislead their audience.

The science of law is no different. The short point is that by taking the discretionary decision to prosecute, the prosecutor signals that the decision has been taken that there is a reasonable prospect that the guilt of the suspect – who now becomes an accused – can be proved beyond all reasonable doubt⁹⁷ – and that is the full extent of the decision. To succeed, the prosecutor must first establish a *prima facie* case for the accused to meet; this must be done in open court by means of evidence

⁹⁶ Op. cit (n94) Part V ‘Proceedings at trial and on appeal’ para 15.3.1; emphases in the original.

⁹⁷ Cf the policy document of the NDPP; see text at n22 above.

which is sufficient both in quantity and tested quality to persuade the trial judge whose exclusive decision this is. It is submitted that the proper words in the vocabulary of the lawyers' art and science to describe the test for the trial judge exclusively, at the end of the prosecution case and before a single defence witness has been heard, are these: is there a *prima facie* case for the accused to meet?

The discretionary decision to be taken by the prosecutor and the judicial decisions to be taken by the trial judge are each based on very different bodies of material and are quite different qualitatively. Even though what the prosecutor has to consider includes sworn affidavits, this material has not yet been heard and tested and challenged in open court. In the strictest legal sense of the word, it is not yet even evidence on the substance of the allegations against the accused; it becomes evidence only when it has been ruled to be admissible as such by the trial court,⁹⁸ to which it has still to be presented in the proper form required by the law for its admissibility to be determined – however straightforward that may be. Further, the prosecutor's decision is one from which there can be no appeal,⁹⁹ and it is taken behind closed doors. It is based on what potential witnesses might

⁹⁸ Roderick Bagshaw et al *Phipson on Evidence* 15 ed (2000) 2 para 1-03

'Evidence, as used in judicial proceedings, has several meanings..... Evidence, in the first sense, means the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some facts in dispute. In the second sense it means the contents of that testimony.'

Colin Tapper, ed., *Cross and Tapper on Evidence* 9 ed. (1999), 1 prefers to use the phrase 'judicial evidence' to distinguish evidence generally of a fact ('that which tends to prove it – something which may satisfy an inquirer of the fact's existence') from that which a court will receive.

⁹⁹ However, in England and Wales a decision not to prosecute may be subject to judicial review: see Archbold above n81 para. 1-263, which notes that the power to do so 'is one that is to be sparingly exercised'. Likewise, the decision to institute a prosecution is also reviewable, but only in rare and exceptional situations such as demonstrable fraud, corruption, mala fides or a failure to follow settled policies on the part of the decision maker. In the last-mentioned context, Archbold is apparently referring to the *Code for Crown Prosecutors* above (n84). In South Africa, it cannot be doubted that the regime established under 1996 Constitution preserves the High Court's common law power to review and to set aside a prosecutor's decision on the grounds that it was taken mala fide or from ulterior motive, or because the prosecutor failed to apply his mind to the matter: cf *Mitchell v Attorney-General, Natal* 1992 (2) SACR 68 (N), though the particular legislation involved in that case would be wholly unconstitutional today. By s 1(b)(ff) a decision to institute or continue a prosecution is not subject to review under the Promotion of Administrative Justice Act 3 of 2000. In *Kaunda v President of the Republic of South Africa* 2005 (1) SACR 111 (CC), the Constitutional Court noted that the Act does not deal specifically with a decision not to prosecute; it assumed in favour of the applicants before it that there might possibly be circumstances in which such a decision could be reviewed, but concluded that this did not avail them. If such a power does exist, it appears that it would be wider than the common-law power: *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*, 2003 (1) SACR 448 (W).

say – sources who have not been tested in cross-examination in open court and who been confronted with those aspects of the defence case which are material to their testimony.

By contrast, at the end of the prosecution case the trial court has real evidence before it when it considers whether a *prima facie* case has been made out for the accused to meet – in South Africa, this is the stage at which s 174 of the Criminal Procedure Act becomes relevant. As shown above, the test under it is of a totally different nature. Because the material available to the prosecution has not been tested before it comes to trial, the decision to prosecute might be entirely reasonable. But only after the prosecution case has ended, can the matter be considered judicially: is there a *prima facie* case?

Finally, whether or not this body of evidence is the final total of the evidence on which the court has to reach its verdict, the test is different again: it remains the duty of the trial court alone to decide, on all the evidence before it, whether the accused's guilt has been proved beyond all reasonable doubt. The fact that the defence may have offered no evidence does not alter the nature of the final decision to be taken by the trial court; it merely affects the final body of evidence on which that decision must be based.

The concept of 'a *prima facie* case' is inextricably linked to the requirement that the trial court exclusively is permitted to decide whether one can be said to have been made out or not. This is made clear explicitly by the Mushwana Report. This linkage, however, is not merely the result of an arbitrary rule formalised by the law. It is a matter of logic and justice in the context of the criminal process that if one of the meanings of the expression is that a person has a case to meet, then it would be preposterous to deny that person the rights of an accused and thus an opportunity to meet it. If the prosecution could claim outside of the court and without laying any charge that there is a *prima facie* case against an individual, the very definition of a *prima facie* case demands that the accused be given the opportunity to make an answer – but an answer to what and made where, if not in open court to evidence which has been heard and tested there? If the Mushwana Report is wrong, then logically the National Director's discretionary decision not to prosecute was based on the view that as Mr Zuma was *prima facie* guilty, it was better that he should not be tried as an acquittal for want of evidence would have been a miscarriage of justice.

It is of great significance that the prosecutor's decision is taken behind closed doors, and is not appealable. These are central elements of the accusatorial model of criminal justice, and it is for these reasons that such great importance is attached to the independence of prosecutors, and such emphasis placed on the transparency of the process by which they

are appointed. The National Directorate of Public Prosecutions in South Africa is not part of the judicial arm of the state,¹⁰⁰ and a statement by the NDPP that a person who will not be brought to trial is nonetheless *prima facie* guilty of an offence does not honour that fundamental aspect of the Constitution. The importance of this cannot be overstated.

Attention has already been drawn to the confidentiality which is required on the part of the prosecution,¹⁰¹ and it seems that the need for such conduct is obvious. The treatment of the matter in Scotland should be noted – the policy and Code of the Crown Office and Procurator Fiscal Service spell out clearly the reasons. It is not apparent how prosecutors' functions in South Africa are so different that prosecutors can be required to state an opinion, publicly and outside of a court, whether or not there is a *prima facie* case in any matter before them. Apart from any other considerations, as has been shown above it is not within the competence of the prosecutor to make such a statement. To the extent that publicity needs to be given to a decision not to proceed in any case, it is hard to visualise how it can ever be necessary to do more than to state simply just that much.¹⁰² To say more risks not merely the harm highlighted in the Mushwana report and the code applying to the Procurator Fiscal in Scotland – great damage to individuals – but also the confusing misuse of the language of the law.

¹⁰⁰ *Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC) at paras 140-6.

¹⁰¹ Above text at n84.

¹⁰² This is, of course, apart from any decision based on the 'public interest' criterion. It is submitted, however, that here too for similar reasons explanations should not be given.